Geary Motor Sales, d/b/a Geary Ford *and* Evelyn L. Schumacher. Case 20-CA-16221

May 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On February 19, 1982, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions[1] and a supporting brief and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Geary Motor Sales, d/b/a Geary Ford, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from Evelyn Schumacher's personnel records, or other files, any reference to her discharge."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT tell employees that they cannot be employed because they have joined a labor union.

WE WILL NOT discharge employees because they have joined a labor union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under Section 7 of the Act.

WE WILL offer Evelyn L. Schumacher immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed and WE WILL make Evelyn L. Schumacher whole for any loss of pay she may have suffered as a result of the discrimination against her, with interest.

WE WILL expunge from Evelyn L. Schumacher's personnel records, or other files, any reference to her discharge.

GEARY MOTOR SALES, D/B/A GEARY FORD

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at San Francisco, California, on January 12, 1982, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on June 9, 1981,[1] and which is based on a charge filed by Evelyn L. Schumacher, an individual (herein called Schumacher), on May 8. The complaint, as amended at the hearing, alleges that Geary Motor Sales, d/b/a Geary Ford (herein called Respondent), has engaged in certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act).

[1] Respondent has submitted with its exceptions certain affidavits in support of its contentions that employee Schumacher's discharge was in accordance with its collective-bargaining agreement with the Union and that reinstatement is inappropriate here because it has no position at its Horse Trader Ed Balatti location equivalent to the one for which it previously hired Schumacher. We hereby grant the General Counsel's motion to strike these affidavits. In so doing, we note, *inter alia*, that such evidence was not previously made a part of the record and that Respondent has not shown that the matters set forth in the affidavits constitute newly discovered or previously unavailable evidence. See Secs. 102.45 and 102.48 of the Board's Rules and Regulations, Series 8, as amended. However, we shall leave to the compliance stage of this proceeding the resolution of any issues concerning the reinstatement order.

[2] In its exceptions, Respondent contends for the first time that the Board should defer this case to the grievance and arbitration procedure of its prior collective-bargaining agreement with the Union. As the issue of deferral was not raised until after the hearing, we find that it was not fully litigated and, consequently, that there is no basis for determining whether deferral is appropriate. See *MacDonald Engineering Co.*, 202 NLRB 748 (1973).

[3] We find that it will effectuate the purposes of the Act to require Respondent to expunge from Schumacher's personnel record, or other files, any reference to her unlawful discharge. We shall modify the Administrative Law Judge's recommended Order and notice accordingly.

[1] All dates herein refer to 1981, unless otherwise indicated.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation which at material times operated an automobile dealership in San Francisco. It further admits that during the past year, in the course and conduct of its business, its gross volume exceeded $500,000 and that it annually purchases goods and materials valued in excess of $50,000 from sources outside California. Accordingly it admits, and I find, it to be an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Teamsters Local 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Participants*

Until June 1981, Respondent operated a Ford dealership on Geary Street in San Francisco. At that time the dealership was sold to another corporation which today operates that facility, now known as Vogel Ford. Respondent continues in business at another location but now trades under the name Horse Trader Ed Balatti. Respondent's corporate president is Edward Balatti, and its corporate vice president is his son, John. John had no corporate duties despite his title. He was a salesman and a member of the bargaining unit. Its business manager during the time in question was Derrel Beard. Respondent admits, nonetheless, that all three were 2(11) supervisors and 2(13) agents.

Respondent entered into its contract to sell the dealership to Vogel Ford sometime in early 1981. As the June 1 closing date approached, it began to wind down its business and reduced its automobile sales force significantly. It nonetheless continued to sell new and used automobiles with a sales force of four or five. At all times the sales personnel were represented for collective-bargaining purposes by the Union. Respondent was bound by a collective-bargaining agreement running from June 1, 1980, to June 1, 1983.

The collective-bargaining agreement contains a standard union shop clause and also provides that the dealer shall be the "sole judge of the competency and/or fitness of salespersons." Furthermore, it contains another clause which prohibits salespersons from performing work not directly connected to automobile sales.

On March 7 Respondent hired Schumacher. She worked for 13 days and left Respondent's employment under circumstances to be described herein. Schumacher testified she was hired to be an automobile salesperson; Respondent's witnesses testified that she was hired to be an "assistant" helping not only the sales department but other departments in the dealership. Her duties involved locating automobiles for dealer trades and "hiking" automobiles between dealerships. She had never worked in an auto dealership before and was generally unfamiliar with sales techniques and information. Her salary was 800 per month.

B. *Schumacher's Testimony*

Schumacher testified she was hired by Ed Balatti to be an automobile salesperson. She said she worked on both the new-car floor and the used-car lot taking her directions from John Balatti. During the course of her employment she says she sold at least three automobiles, new and used. On each occasion the executed sales contract was filled out by another salesperson, usually Robin Ross, though, she says, she first filled out a contract form in the customer's presence. Each sale was jointly credited to both of them on the sales "board"—a window on which each monthly sale was recorded in white shoe polish. On two of those occasions she obtained cars by going to other dealers, once to Half Moon Bay and once to Folsom and driving the automobiles back to San Francisco.

She testified that John told her to use the business cards of former salesmen. She was to scratch their names out and write in her own. Such a card was received in evidence.

During her testimony she demonstrated a great deal of ignorance regarding sales techniques and facts. She was unfamiliar with interest rates, automobile base prices, option prices, and the markups and discounts associated with them.

On March 18 John Balatti directed her to obtain an automobile salesperson's license as required by state law and she did so. She said that while she was at the Department of Motor Vehicles office she spoke to a salesman from another dealership who told her about the Union. On March 23 she went to the union office, paid a fee, and joined. Later that morning, shortly before lunch, she went to John Balatti's office to show him her union card, saying that she had now completed "Step Two" (step one being the DMV license). She testified he became very upset, threw a pencil, and yelled, "For Christ's sake, why did you do it?" She said his yelling confused her; he asked again why she had joined. She replied she thought she was supposed to.

She says he then went into a long tirade explaining now that she had joined, she was a threat and could not work. He said another set of books would be required. She could not work 10 hours a day, it would cost more money for health insurance and would limit her Sunday work. About that time Ed Balatti came into the office, overheard John tell her that perhaps she could still stop the check; if she did maybe she could continue to work. She remembers Ed remarking John "shouldn't have said that" to which John replied "I didn't say anything to Evelyn." She did not describe how the conversation ended.

The next morning, March 24, when she reported for work, she had another conversation with John. She testified he again told her she could not work because she had joined the Union. She says he repeated that her joining would cost Respondent additional money but she

was unclear on the details. John, apparently, did not attempt to discharge her.

Later, during John's lunch hour, Ed Balatti spoke to her saying he wished she had not joined the Union, telling her "we cannot use you." A short time later she had another conversation with Ed in his office. She said she was "sorry about all the yelling yesterday" but could not understand what the fuss was about. She says Ed told her she could not continue working because she had joined the Union. Then he told her to go down to the bookkeeper's office and he would have a check for her. She did so, cleaned out her desk, and left. Her check was for 13 days' salary; no commissions were included.

C. *Respondent's Testimony*

As noted, both Ed and John Balatti testified that Schumacher was hired as an assistant having no sales duties. According to Ed, however, any employee was free to follow a lead to a customer, including Schumacher. He said that when a nonsalesman found a customer he or she would be rewarded in some fashion and the money which ordinarily would have gone to sales commission would be treated as a house sale under the collective-bargaining agreement. Thus, he says, the sales in which Schumacher was involved were of that nature and not those of a regular salesperson.

All three company officials who testified observed that the Department of Motor Vehicles requires all personnel who have any contact with customers to obtain an auto salesman's license. It was for that reason, John says, that Schumacher was asked to obtain a license, not because she was actually engaged in the sale of automobiles. They note that, while she was "hiking" an auto for the dealership, she would be using dealer tags and if stopped by a policeman she would be required to prove she had the right to use a dealer tag. The salesman's license would serve that purpose. Moreover, they noted that she did have occasional contacts with customers when delivering automobiles. In the circumstances, therefore, they believed they were obligated to require her to be licensed.

John also testified that Schumacher had some misconceptions about her duties. On a couple of occasions he received complaints from salesman Ross that she was attempting to "horn in" on his commissions. He says he attempted to put a stop to it but she did not appear to understand.

John also denied that on March 23 he had any significant conversation with Schumacher. He testified "she came in my office and had the union, the clearance slip, and I didn't throw a pencil at her or anything like that like she said. I went upstairs. It was getting close to noon. I didn't have time to talk to her. At that time I was training for the 49ers and I would work out from 12 until 4 every day. So, I didn't have time to deal with her. I went upstairs and told my dad and he came down directly and that was that and I was gone. There was no heated conversation, no pacing behind my desk."

He agrees, however, that he did not understand why she had joined the Union because she was not a salesperson. According to him it was "not her capacity" and, as his own duties were principally that of a salesman and as he was a union member himself, he believed if she were to continue performing the duties she had been hired to do she would cause Respondent to violate the clause in the collective-bargaining contract barring salespersons from doing the auto hiking and assistant work that she had been performing.[2]

It appears that all three company officials, Ed Balatti, John Balatti, and Derrel Beard all believed that Schumacher's joining the Union while continuing to perform the duties for which she had been hired, would cause Respondent to violate the contract. Indeed, Ed says he telephoned a union official, explained the situation to her, and she agreed with his analysis. Accordingly, Ed testified, he could not use Schumacher in that circumstance but he offered to arrange an employment interview for her with a nearby Chevrolet dealership. John testified he was aware there had also been an effort to get her an interview with a Toyota dealership.

Schumacher agrees that she interviewed with the Chevrolet dealership but denies any appointment was made for her to interview with the Toyota dealership. She also denies that Ed or John tried to clarify her duties after she was hired.

In any event, it is clear that under Respondent's version its management team was laboring under the belief that Schumacher's joining the Union would put Respondent in some sort of contract jeopardy. As a result, Ed asked her to leave.

IV. ANALYSIS AND CONCLUSIONS

In view of the foregoing facts, it appears to me to be unnecessary to attempt to resolve the credibility dispute regarding what duties Ed Balatti told Schumacher she had when she was hired, or to resolve disputes regarding any alleged clarification of her duties at a later time. It is clear that Schumacher believed she was hired as a salesperson, but that fact is immaterial in analyzing the legality of her discharge. Respondent, according to the testimony of both John and Ed Balatti, as well as a statement made to the Regional Office by Beard, believed that Schumacher's joining the Union required it to treat her as a salesperson and as a member of the bargaining unit covered by the collective-bargaining contract. That belief is simply not well-founded. Whether the belief was in good faith as suggested by Respondent or whether it was a contrivance as might be suggested by Schumacher or the General Counsel does not really matter. The fact is that Ed Balatti did not wish to employ this individual upon her joining the Union. Assuming that he made a mistake in interpreting the collective-bargaining agreement, even if that mistake were compounded by the belief of the union official,[3] that mistake affords Re-

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[2] Both Ed and John Balatti refuted her testimony that she had been told to utilize the business cards of former employees by scratching out their names and writing in her own. They say that the print shop across the street had a supply of blank business cards and would instantly print the name of any new hire on them upon request. Assuming that to be so, considering the business' wind down, their refutation is not complete, for they might simply have chosen to save whatever small expense was involved in printing.

[3] Since the union official did not testify I cannot discern whether she was operating under a mistaken factual belief regarding Schumacher's

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spondent no defense. Compare *Orr Iron, Inc.*, 207 NLRB 863 (1973), enfd. 508 F.2d 1305 (7th Cir. 1975). There an employer fired an employee for supporting a union in the mistaken belief that he was a supervisor, but the discharge violated the Act because he was not.

Accordingly, I conclude that Respondent's discharge of Schumacher on March 24 was a direct response to her having joined the Union. Section 7 of the Act permits employees to join or refrain from joining labor unions whether or not those unions actually represent the employee under Section 9 of the Act. Her discharge in that circumstance violated Section 8(a)(3) and (1) of the Act.[4]

The General Counsel also alleges that Respondent violated the Act when John Balatti, on March 23, allegedly exclaimed to Schumacher when she told him she had joined the Union, "What did you do that for . . . . why did you join the Union?" Assuming that her testimony is to be credited over John's version and there is some reason not to do so,[5] it does not appear to me that the questions were questions at all. The General Counsel alleges them to be interrogations having a tendency to coerce or restrain Schumacher in the exercise of her Section 7 rights. However, the words as described by her appear to be expressions of amazement not designed to elicit a response. Accordingly, as I stated on the record, I cannot conclude that they were uttered in coercive circumstances. I shall, therefore, recommend that the allegation regarding unlawful interrogation be dismissed.

The last allegation involves a claim that on March 23 John Balatti also threatened Schumacher with discharge for having joined the Union. Here, despite any doubts about Schumacher's credibility, I find the allegation has been proven. She testified on that day John Balatti told her by joining she had become a threat and could not work, and the next day made a similar remark. In view of her subsequent discharge in the fashion as described by Respondent's own witnesses, the surrounding circumstances support her version, not Balatti's denial. Accordingly, I find Respondent violated Section 8(a)(1) by telling her she could not work because she had joined the Union.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by discharging its employee, Evelyn L. Schumacher, for exercising her Section 7 right to join a labor union, and Section 8(a)(1) for making a coercive statement, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, I shall recommend that Respondent be required immediately to offer reinstatement to Schumacher and to make her whole for any loss of pay she may have suffered by reason of the discrimination against her. Backpay and interest thereon shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged its employee Evelyn L. Schumacher on March 24, 1981, because she joined a labor union.

3. Respondent violated Section 8(a)(1) of the Act when, on March 23 and 24, it told Schumacher she could not work because she had joined the Union.

4. Respondent did not engage in any other violations of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Geary Motor Sales, d/b/a Geary Ford, d/b/a Horse Trader Ed Balatti, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees they cannot be employed because they have joined a labor union.

(b) Discharging employees because they have joined a labor union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Immediately offer Evelyn L. Schumacher reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole, with interest, for lost earnings in the manner set forth in the section of this De-

circumstances. Ed Balatti's testimony regarding her statement is hearsay insofar as it was offered for the truth of the matters asserted in the official's declaration.

[4] Respondent's second defense, that Schumacher had promoted herself to a salesperson, fails in this circumstance. She had engaged in the protected act of joining the Union. By Balatti's own testimony, he was concerned, mistakenly, that she would cause him to breach the contract when engaged in the duties she was hired to do. Clearly he was not going to permit her to be a salesperson, even if that is what she wanted. Moreover, her desire to become a salesperson would not be particularly unusual. Another employee had recently followed nearly the same route. Firing such an aspirant, therefore, seems unusually harsh. I believe, therefore, that the "attempt to promote herself" as a ground for discharge is not believable.

[5] I.e., demeanor and attitude as reflected by her tendency to visibly react (in amazement, dismay, etc.) to the testimony of others.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

cision entitled "The Remedy," dismissing if necessary any employee who replaced her.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all of the records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its San Francisco, California, facility, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the remainder of the complaint be, and hereby is, dismissed.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."